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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 637

ROBERT STUEBER AND JAMES STUEBER,
Petitioners,

vs.

ADMIRAL CORPORATION,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners file this brief in reply to the Brief dated April 12, 1949, submitted by the respondent.

I.

The Petitioners Were Deprived of the Right of Trial by Jury; the Respondents Have Not Met This Contention.

The Respondent's* Brief in Opposition to the Petition for Certiorari filed herein has completely avoided the question presented in the Petition for Certiorari, that is, that "plaintiffs* were deprived of their right to trial by jury by the Court of Appeals when that Court presumed the jury

* Plaintiffs-petitioners are hereinafter referred to as "plaintiffs," and respondent as "defendant."

not skillful enough to understand a simple instruction". That avoidance has been accomplished by the defendant's arrangement of the questions presented in the Brief in Opposition (p. 5) by which arrangement defendant completely eliminated that important question.

The defendant's position is very simple. It seeks to mislead this Court into the belief that the questions presented are procedural and that the important question that the Court of Appeals presumed the jury not skillful enough to understand the simple instruction discussed under Point I of the Reasons for Granting Petition for Certiorari (pp. 10-15) is not before this Court. The complete avoidance of this point and the defendant's limited discussion of the authorities relied upon by plaintiff in support thereof, only serves to emphasize the importance of this reason for granting certiorari.

The apparent reason for the failure to answer this point is the defendant's desire to conceal from this Court the fact that the two identical instructions criticized by the Court of Appeals in the case at bar, were two instructions given by the court at the defendant's request (R. 283, 328-329, 407). The tendered instructions were given by the District Judge, and as lawyers for defendant, they were certainly skilled enough to determine whether their own instructions were plain and clear for the purpose for which they were intended. If the instructions, which we agree are plain and clear, were not simple enough for the jury to understand as is now asserted by the Court of Appeals, then the defendant should bear the consequence of any insufficiency of its own instruction and it is contrary to every existing decision to penalize a plaintiff for the defendant's error.

We submit, however, that these instructions coming at a time when the court had directed the jury to find the

defendant not guilty as to the charges of false arrest and false imprisonment and had further instructed the jury that the only issue for the jury's determination was whether or not defendant maliciously prosecuted the respective plaintiffs (R. 325) which instructions limited for the jury's determination solely the issue of malicious prosecution following the signing of the complaints by defendant's employee and as applied to the record and to the evidence of the case, it is manifest that the jury understood these instructions and correctfully interpreted the charge of the trial court.

The Court of Appeals held in its opinion *that the issue was one properly for the jury, and that there was no error in the trial court's action in overruling a motion for directed verdict; that there was no error in the trial court's giving and refusing of instructions and the court's admission and exclusion of evidence with the sole exception here under discussion.* (Italics supplied.) It is evident that the Court of Appeals could not upset the verdict of the jury as being excessive, but it effected that result by erroneously granting a new trial. It thereby deprived plaintiffs of their right to trial by jury, in conflict with the Seventh Amendment to the Constitution of the United States.

The defendant in its Brief in Opposition concedes the correctness of the cases cited in support of plaintiff's position but takes refuge in the statement that the instructions, given by the District Court at the defendant's own request, are not plain and simple, and in so doing, attempt to distinguish the cases cited by the plaintiffs. A mere reading of the instructions referred to clearly negatives the defendant's contention.

II.

The Need for a Clarification by This Court of the Conflict That Exists Between the Several Courts of Appeal on Important Matters of Federal Practice and Procedure, Is Further Emphasized by Respondents.

The defendant insists that it followed the correct practice in its motion to strike evidence admitted without objection. The motion to strike was made at the close of the evidence on the part of the plaintiff following the denial by the trial court of a motion for directed verdicts (R. 180). There was then before the jury the charges of false arrest, false imprisonment and malicious prosecution.

In support of its position defendant cites a general rule found in 64 C. J. p. 203. It is an imposition on this Court to cite general rules from Corpus Juris and to deliberately omit qualifications therein stated. The rule quoted by the defendant (Brief in Opposition, p. 10) is qualified by the following additional language which the defendant deliberately and improperly omitted (64 C. J. p. 205):

> "Subject to the rules hereinafter stated as to the *necessity of a previous objection*, and as to the *time of the making of the motion* and the *sufficiency of the motion* evidence may be stricken out on motion. * * *" (Italics supplied.)

The italicized portion of the foregoing quotation emphasizes three reasons for the impropriety of the defendant's motion to strike made at the close of the plaintiff's case.

We have discussed at length these identical points at pages 15 to 19 of the Petition for Certiorari. In that discussion we showed that the Court of Appeals' decision in the instant case is in conflict with all the decisions cited and discussed under Point II of the Petition (Pet'n for Cert., pp. 15-19).

On the trial, the defendant made no objection to any of the plaintiff's evidence, including that which the Court of Appeals held should have been stricken. The motion to strike the evidence was made at the close of the plaintiffs' case (R. 180-181). The District Judge had overruled a motion for a directed verdict on all the issues in the case. A motion to strike and a request for instructions to the jury to disregard the evidence relating to the issues of false arrest and false imprisonment was not made at the close of the evidence when the court granted the motion of the defendant for a directed verdict on the charges of false arrest and false imprisonment. The court's discussion of its ruling at that time with counsel invited such a request and instructions (R. 281-284).

The defendant was satisfied with its own tendered instructions which were given by the District Court and which the Court of Appeals though holding said instructions to properly state the law, criticise as insufficient. There was no request made by defendant at any time in the trial to have the jury disregard this evidence other than by its own tendered and given instructions.

The form of the motion to strike the evidence was improper in that it was too general. It did not inform the District Court of the precise evidence sought to be stricken (R. 180).

Defendant cites *Wendell* v. *Willets,* 183 Fed. 1014. This decision actually supports the contention of the plaintiff. There the Court stated:

> "Slight errors will creep into any trial of length, such as this was, as will more or less immaterial evidence, *the bearing of which cannot be actually determined until the case is ready for submission.* If such evidence is apparently competent at the time a motion should be made to strike out or a request made for instructions to the jury to disregard the same, if in

> the course of the trial it becomes evident that the evidence is in fact immaterial and is or may be in fact prejudicial." (Italics supplied.)

The evidence remained competent until the close of all of the evidence, when the court instructed the jury to find defendants not guilty as to the charges of false arrest and false imprisonment. It then became the defendant's duty to have requested the court to charge the jury to exclude from the record the evidence which was allowed in the case relating to the charges of false arrest and false imprisonment, and that the jury be instructed to disregard such evidence.

Defendant's citation of *Frankfurter* v. *Bryan,* 12 Ill. App. 549 does not bind the Federal Courts on proper procedural practice to be applied in the Federal Courts. Nor is it in point on the facts, since in that case at the close of the plaintiff's case one of the defendants was dismissed. Under those circumstances the motion to exclude from the jury's determination evidence relating to the action of the dismissal of defendant was proper; but for that reason the case is not analogous.

Defendant deliberately, improperly and contemptuously resorts to a misstatement of the decision in *Ross* v. *N. Y. C. & St. L. R. Co.*, 73 F. 2d 187 (C. A. 6) as appears on page twelve of its Brief in Opposition. Directly contrary to the defendant's statement that there had been no timely objection or that there had been a failure to object, the principal claim of error before the Court of Appeals in the *Ross* case was that the trial court had permitted evidence to be received over objection and exception as to the existence and promulgation of a certain safety rule. At page 187 the following language appears:

> "The principal claim of error made on behalf of the plaintiff is that the trial court erred prejudicially

> in *permitting evidence to be received over objection and exception* as to the existence and promulgation of a certain safety rule of the defendant claimed to have been violated by the plaintiff." (Italics supplied.)

The defendant's discussion of the case of *Ball* v. *Sheldon*, 218 Fed. 800 (C. A. 2) is likewise deliberately distorted. That case was cited for the correct rule to be followed with respect to evidence admitted without objection or admitted properly over objection and which later becomes incompetent; that is, that instructions be sought that the jury disregard the evidence. The Court in that case said:

> "The correct practice, when testimony properly admitted over objection has become incompetent, is not to move to strike it out, but to ask the court to direct the jury to disregard it. *Marks* v. *King*, 64 N. Y. 628; *Homnes* v. *Moffatt*, 120 N. Y. 159, 24 N. E. 275."

Again a deliberate falsehood is contained on page 13 of defendant's brief in opposition when they say "when defendant first objected to it (the evidence) by a motion to strike." (Br. in opposition p. 13.) The defendant never objected to the evidence. A motion to strike is not an objection.

The statement to the court that the "prejudicial evidence was incompetent when defendant first objected to it by a motion to strike" is not a correct statement of law or fact. The evidence was competent since the court had overruled motions for directed verdicts on all the issues in the case. The evidence could only have become incompetent when the motion for directed verdict was allowed as to the charges of false arrest and false imprisonment.

The defendant's brief in opposition presents no authorities which resolve the conflict on these matters existing between the several courts of appeal. Defendant's

misleading discussion of the authorities relative to the proper practice relating to the exclusion of evidence and to motions to strike and the duty of securing proper instructions from the court to the jury, emphasize the need for a clarification by this Court of that problem.

A conflict does exist between the Courts of Appeal as we have amply demonstrated in our reasons in support of the Petition for Certiorari (pp. 15-19). The clarification of this conflict requires the granting of certiorari and of a decision by this court.

III.

The Conflict Between McCandless v. U. S., (1936) 298 U. S. 342 and Berger v. U. S., (1935) 295 U. S. 78, Requires Reconciliation by a Decision of This Court.

Defendant's attempt to dispose of plaintiffs' contention relating to a proper construction of *Rule 61 of the Federal Rules of Civil Procedure* relating to harmless error by the citation of *McCandless* v. *U. S.*, 298 U. S. 342. In so doing there is brought into sharp focus the need for the settlement of the conflict between the Court of Appeals for the Seventh Circuit and other Courts of Appeal on the same matter. The decision of the Court of Appeals for the Seventh Circuit is in conflict with other Courts of Appeal as well as its own decision in the following cases: *Norwood* v. *Great American Ind. Co.*, 146 F. (2d) 797 (C. A. 3, 1944); *Keller* v. *Brooklyn Bus Corp.*, 128 F. (2d) 510 (C. A. 2, 1942); *Garree, et al.* v. *McDonell, et al.*, 116 F. (2d) 78 (C. A. 7, 1940).

The conflict between these Circuits is neither met nor discussed by the defendants. It therefore requires the decision of this Court reconciling this conflict.

In *Matter of Barnett,* 124 F. (2d) 1005, 1011 (C. A. 2, 1942), Circuit Judge Frank said:

> "* * * the doctrine of 'harmless error', * * * to the chagrin of those devoted to a conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which do no real harm."

To say that the alleged error in the instant case affected the substantial rights of the defendant, requires an examination of the entire record. Such an examination discloses that the alleged error did no real harm nor did it affect the substantial rights of the defendant. The alleged error relied upon by the defendant for reversal was created by the defendant itself in failing to object to certain allegedly prejudicial testimony; and in cross-examining thereon; in introducing similar evidence; in moving at the close of the plaintiff's case to strike certain evidence admitted without objection; in failing to renew such motion at the close of all the evidence; and in tendering instructions given by the District Court limiting the consideration to be given by the jury to such evidence. *Garree, et al.* v. *McDonell, et al.,* 116 F. (2d) 78 (C. A. 7, 1940).

The Court of Appeals thereafter predicated its reversal upon two identical instructions tendered by the defendant and given to the jury by the District Judge, which the Court of Appeals though saying are a proper statement of the law, has criticized as not being sufficient to remedy the alleged error relating to the overruling of the defendant's motion to strike certain testimony. The Court of Appeals has been misled by the defendants to make it appear that the criticized instructions were given at the request of the plaintiff and not at its own request. *The same deliberate intention to mislead this Court* is demonstrated in the defendant's discussion of said instructions (Resp. Brief, pp. 15-16) where it is nowhere admitted or even indicated that

the instructions that they there criticize were the defendant's own. They are criticized as being insufficient and pointed to as error, allegedly affecting defendant's substantial rights, *as flagrantly as if the instructions had been tendered not by defendant but by the plaintiff*. If the defendant's substantial rights were indeed affected then the defendant has succeeded in obtaining a reversal by error of its own creation which it has deliberately made to appear as error of the plaintiff.

In effect, the defendant up to this point, has succeeded in not alone effecting a reversal of the judgment of the District Court by deliberately misleading the Court of Appeals, but has successfully defeated the intentions of *Rule 1 of the Federal Rules of Civil Procedure* "* * * to secure the just, speedy, and inexpensive determination of every action", but as well of *Rule 61 of the Federal Rules of Civil Procedure* relating to harmless error, by conduct richly deserving of condemnation and severe censure.

Neither the *McCandless* v. *U. S.*, 298 U. S. 342 case, nor any other decision of this Court was intended to bring about such an unjust result nor to invite nor encourage a miscarriage of justice by evasion or trickery on the part of lawyers in either trial or appeal.

In answer to our contention that the alleged error of the District Court in denying defendant's motion to strike was rendered harmless under *Rule 61 of the Federal Rules of Civil Procedure* in the light of the record that discloses that the defendant introduced similar evidence, cross-examined on the testimony it later sought to have stricken, and tendered instructions which were given by the District Court limiting the consideration to be given to this evidence, the defendant relies on the *McCandless* case, 298 U. S. 342 requiring an "affirmative showing that the evidence was not prejudicial".

This only emphasizes not only the need to reconcile the conflict between the several Courts of Appeal on *Rule 61 of the Federal Rules of Civil Procedure*, but for a decision of this Honorable Court reconciling its decision in the *McCandless* case with its decision in the case of *U. S.* v. *Berger*, 295 U. S. 78 (1935), which sought to put an end to the too rigid application of the presumption of error rule, and to establish the more reasonable rule that if, upon an examination of the entire record, substantial error does not appear, the error must be regarded as harmless.

IV.

Permitting Respondent to Secure a Reversal for Its Own Error Is Such a Clear Departure from the Accepted and Usual Course of Judicial Proceedings as to Require the Exercise of this Court's Power of Supervision to Prevent a Gross Miscarriage of Justice.

The Brief in Opposition avoids a direct answer to the contention that the defendant has secured a reversal for errors in the District Court that the defendant itself created. When it is considered that the actual basis for the Court of Appeals' reversal of the District Court in the instant case is that two identical instructions of the District Court, which were given at the defendant's request (R. 283, 328-329, 407) were not clear and specific enough to properly advise the jury as to what was meant by the trial court, it is plainly apparent that the reversal is predicated upon the defendant's own error. The legal effect of this result is to permit the defendant to profit by its own error at the expense and to the detriment of the plaintiffs.

Such a result is contrary to and a clear departure from the accepted and usual course of judicial proceedings, amounts to a gross miscarriage of justice, and establishes

so undesirable a precedent as to require the exercise of this Court's power of supervision to correct.

Conclusion.

It is respectfully submitted that a writ of certiorari be granted.

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